

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN  
APPELLATE DIVISION

On Appeal from the Territorial Court of the Virgin Islands

**BEFORE:** **Raymond L. Finch**, Chief Judge of the District Court of the Virgin Islands; **Thomas K. Moore**, Judge of the District Court of the Virgin Islands; and **Patricia D. Steele**, Judge of the Territorial Court, Division of St. Croix, sitting by designation.

**Julio A. Brady, Esq.**  
St. Croix, U.S.V.I.  
*Attorney for Appellees.*

**MEMORANDUM OPINION**

Per Curiam.

## **I. INTRODUCTION**

Gary E. Berne ["Berne" or "appellant"], individually and in the right of and for the benefit of B&B Corporation, Berne Corporation, and Gerard Louis Berne Trust, appeals the Territorial Court Judge's ruling (1) staying the enforcement of a settlement agreement reached by the parties in this matter and (2) finding that a subsequent modification of the agreement was invalid because it was not approved by all of the parties. Because the trial court did not incorporate the terms of the settlement into its order dismissing this action, we conclude that the trial court lacked jurisdiction to consider Berne's motion for enforcement of the settlement agreement, and will vacate the Territorial Court opinion staying the motion.

## **II. FACTUAL HISTORY**

The following facts are undisputed. In 1979, Gerard Louis Berne, father of appellant Gary Berne, executed a trust for the purpose of disposing his assets, including shares of stock in Berne Corporation and B&B Corporation and several parcels of commercial real estate, upon his death. The trust provided that his assets would be divided evenly between Gary Berne and his sister, Carol Berne; Carol Berne's half would remain in the

trust, while Gary Berne would receive one-half of the trust estate outright.

Louis Boschulte ["Boschulte"], Marjorie Lewis ["Lewis"], and Dilsa Capdeville ["Capdeville"] were appointed as trustees of Carol Berne's trust, while Gerard Berne's estate plan allowed Gary Berne to continue to manage the family properties. As trustees, they were entitled to vote the trust shares of each corporate entity. In addition to their appointments as trustees, appellees Boschulte and Danielson were directors and officers of each of the corporations and Lewis was an officer of each corporation.

Upon Gerard Berne's death in 1983, his shares of the corporation transferred to the appellant. Since that time, Berne has acted as director and president of the corporations. Together, Berne, Boschulte, and Danielson constituted the full board of directors of both corporations.

### **III. PROCEDURAL HISTORY**

At some point, Berne and the trustees of Carol Berne's trust were no longer able to cooperate in the running of the companies. As a result, Berne initiated this action in the Territorial Court alleging, *inter alia*, misconduct, abuse of trust, breach of fiduciary duties, and self-dealing by the defendants. (See J.A.

at 1-18.) Berne sought injunctive relief to prevent the appellee officers from ousting him as president of the two companies.

At a hearing on Berne's motion for a preliminary injunction, the parties informed the court that they had entered into a settlement agreement. The terms of the agreement were then read into the record, and the trial judge questioned each party individually to ascertain his or her understanding of the agreement. (See Prelim. Inj. Hr'g Tr., 158-189 (July 6, 1998).) As read into the record, the original draft contained a clause stating that

[t]he parties further agree that the Court shall retain jurisdiction over this cause, and shall have the power to enter such orders and take such further action as may be necessary to effectuate the intent of the parties and the matters as set forth in this memorandum.

(*Id.* at 164-65.) The trial judge objected to this language, stating that

I only retain - remember, it was not retaining jurisdiction, it's a new cause of action. If you think there is a breach [sic] of the stipulation, I'm not going to stay in there as a super super director.

(*Id.* at 165 (emphasis added).) The parties then agreed to delete the language concerning the Territorial Court's jurisdiction, noting that they retained "the right to bring a separate action to enforce the settlement agreement, should it become necessary." The trial judge again informed each of the parties, individually,

that the trial court would not retain jurisdiction over the settlement agreement, and that any alleged breach of the settlement would constitute a "whole new action." After each of the parties agreed to this modification, the judge orally dismissed the matter with prejudice. (*See id.* at 166-89.)

The parties subsequently filed a copy of the signed settlement, absent any language concerning the trial judge's jurisdiction over the matter, with the Territorial Court. In a written order dated September 23, 1998, the trial judge<sup>1</sup> noted that this matter had originally been before the court for a hearing on the appellant's motion for a temporary restraining order and preliminary injunction. The judge explained that

[a]t the end of the hearing, the parties informed the Court that a settlement was reached. The agreement has now been reduced to writing. Accordingly, it is ORDERED that this action shall be DISMISSED.

(J.A. at 25.)

The agreement called for the sale of Carol Berne's fifty-percent (50%) shares in each corporation to her brother, appellant Berne, contingent upon Berne's disclosure to the Board of Directors of each company of "all books and record of B&B Corporation from 1991 to the present." The agreement also

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<sup>1</sup> The record indicates that Territorial Court Judge Brenda Hollar presided over the July 6, 1998 hearing and orally dismissed the matter with prejudice. It appears that the case was then transferred to Judge Ishmael A. Meyers, who signed the written order dismissing the case, and considered the subsequent motions to reopen and enforce the settlement agreement.

required Gustave Danielson's removal as a Director from each corporation and the election of William Quetel ["Quetel"] in his place. (*Id.* at 20-23.) All of the parties to the agreement mutually selected and assented to Quetel's replacement of Danielson.<sup>2</sup>

Under the terms of the settlement agreement, Quetel's responsibilities included reviewing the books of the corporation, reviewing appraisals, negotiating a selling price for the corporate stock with the parties, and determining a price per share if the parties were unable to reach an agreement. In addition, the parties were to determine a mutually agreeable compensation for Quetel for the completion of these tasks. (*Id.*)

Following the execution of the agreement, Quetel declined to serve in his designated capacity. Subsequently, a special meeting of the shareholders selected Dr. Richard Moore ["Dr. Moore"] to replace Quetel, and the shareholders signed a Unanimous Written Consent in Lieu of a Special Meeting of the Shareholders of B&B Corporation ["Unanimous Written Consent"], electing Dr. Moore as the new director. (*Id.* at 28-31.) In addition, the Unanimous Written Consent specifically stated:

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<sup>2</sup> The settlement agreement was signed by appellant Berne and his wife, Cynthia Berne, and appellees Boschulte, Danielson, Lewis, and Capdeville. The selected valuator, Quetel, and the attorneys for the parties, James M. Derr and Alan Smith, also signed the agreement. (See J.A. at 23-24.)

RESOLVED, that each of the undersigned consent, individually and in their capacity as shareholders of the Corporation, to a modification of that certain Settlement Agreement executed by the parties on or about \_\_\_\_\_, 1998, to substitute the name of Richard Moore for and in place of William Quetel, and confirm, ratify and consent to the remainder of the terms and conditions of said Settlement Agreement in all other respects.

(*Id.* at 28.) This document was signed by Berne, Boschulte, Lewis, and Capdeville. (*Id.*)

Following his appointment, Dr. Moore evaluated the corporate assets and issued a report. Subsequently, the appellees sought the removal of Dr. Moore, due to his "lack of impartiality." On July 6, 1999, Berne moved the Territorial Court to reopen the matter to enforce the settlement agreement, including the Unanimous Written Consent. The appellees averred below that "to the extent that the case can be reopened, [they] hereby waive any objection to further proceedings relating to the issue of enforcement of the Settlement Agreement." (*Id.* at 248<sup>3</sup>.) The trial judge granted the motion to reopen the matter, and held a hearing on the motion to enforce the settlement agreement.<sup>4</sup>

Based on the legal memoranda filed by the parties and the

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<sup>3</sup> It appears as though the the Joint Appendix is incorrectly paginated, as the defendants' Memorandum of Law is numbered as pages 235 through 254, although the preceding page is 31. This Memorandum Opinion will cite to the pages as they are numbered in the Joint Appendix, despite the error.

<sup>4</sup> Berne also sought injunctive relief, which Judge Meyers declined to grant.

testimony presented at the hearing, the trial judge concluded that the original settlement agreement was a valid and enforceable contract, and that Quetel's refusal to assume the position of director was a "material term." He thus rejected Berne's interpretation of the Unanimous Written Consent, and found that the document substituting Dr. Moore for Quetel constituted a modification to the original settlement agreement. Because the subsequent agreement was not signed by all of the parties to the original agreement, namely Danielson, the Territorial Court Judge found it invalid. He concluded that Danielson's lack of consent rendered the document "fatally flawed" and that the corresponding substitution of Dr. Moore for Quetel, along with Dr. Moore's appraisal of the corporate assets, were invalid. The trial judge then proposed that the parties to the original agreement select an individual to replace Quetel and include their decision in a written modification signed by each of them. By doing such, the trial judge reasoned, the parties "would unequivocally demonstrate . . . [a] meeting of the minds." The judge then stayed Berne's Motion for Enforcement of Settlement Agreement pending the parties' compliance with the terms of the Settlement Agreement. (*Id.* at 228-233.)

Berne timely appeals the trial judge's decision.



#### **IV. DISCUSSION**

On appeal, Berne challenges the trial judge's decision staying his Motion for Enforcement of Settlement Agreement, and argues that (1) the settlement agreement is a severable contract and Danielson's consent was not required to modify the settlement so that Dr. Moore replaced Quetel and (2) Danielson had waived any objection he may have had to the modification of the settlement agreement. The appellees contend that this Court lacks jurisdiction over the appeal because the order appealed from is not a final order. Instead, they argue, the judge's order does not end the case or controversy because it requires the parties to take further action to effectuate the settlement agreement.<sup>5</sup> Alternatively, the appellees contend that the trial court correctly found that the Unanimous Written Agreement was an invalid modification of the settlement agreement.

Before this Court can address the merits of Berne's claims, or even its own jurisdiction over this matter, it must first consider whether the trial court retained jurisdiction over the settlement agreement after having dismissed the underlying action, even when none of the parties raised the issue and the

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<sup>5</sup> The appellees also aver that this Court lacks jurisdiction over this matter under Virgin Islands Rule of Appellate Procedure 6 because (1) it is not an appeal from an interlocutory order addressing interlocutory relief; and (2) the appellant failed to obtain certification of this appeal by the Territorial Court. See V.I. R. APP. P. 6(a)(i)(ii) and 6(a)(i)(iii).

judge below did not address it.<sup>6</sup> We conclude that the Territorial Court was without jurisdiction to reopen the original case which had been dismissed with prejudice.

The Supreme Court, in considering whether a trial judge has the "inherent power" to enforce a settlement agreement, concluded that "[e]nforcement of the settlement agreement, . . . whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994). In granting the parties' stipulation and order of dismissal with prejudice, the trial judge had not referred to the settlement agreement or explicitly reserved jurisdiction to enforce it. *Id.* at 377. The Supreme Court held that, where a party seeks "enforcement of the settlement agreement, and not merely reopening of the dismissed suit by reason of the breach of the agreement that was the basis for dismissal," the trial judge has neither ancillary jurisdiction nor the "inherent power" to enforce the settlement. Rather, a trial judge has the jurisdiction to enforce a settlement agreement only

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<sup>6</sup> *See Shaffer v. GTE North, Inc.* 284 F.3d 500, 502 (3d Cir. 2002) (raising trial court's jurisdiction *sua sponte* "as every court is obligated to do when subject matter jurisdiction is in question"). We review the legal question of the trial court's jurisdiction *de novo*. *Id.* (citing *In re Phar-Mor, Inc. Sec. Litig.*, 172 F.3d 270, 273 (3d Cir. 1999)).

if the parties' obligation to comply with the terms of the settlement agreement [1] had been made part of the order of dismissal – either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or [2] by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.

*Id.* at 381.<sup>7</sup>

Accordingly, we conclude that the trial judge did not retain jurisdiction to enforce the settlement agreement. At no point in the July 6, 1998 hearing, when the terms of the agreement were read into the record, did the trial judge express an intent to preside over the settlement.<sup>8</sup> To the contrary, the trial judge

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<sup>7</sup> See *Shaffer* 284 F.3d at 504-05 (vacating, for lack of jurisdiction, district court's grant of a motion to enforce settlement agreement); *Phar-Mor*, 172 F.3d at 274-75 (holding that the phrase "pursuant to the terms of the Settlement" in the dismissal order was insufficient to incorporate the terms of the settlement agreement and therefore did not confer subject matter jurisdiction over settlement enforcement); *Sawka v. Healtheast, Inc.* 989 F.2d 138, 141 (3d Cir. 1993) (reversing district court's enforcement of settlement agreement after court had dismissed the underlying case "without incorporating the terms of the settlement, and hence, without specifically retaining jurisdiction to enforce it"); *Washington Hosp. v. White*, 889 F.2d 1294, 1299 n.9 (3d Cir. 1989) (holding that, because court's order stated that it had "so ordered" the stipulation, the document had "the same effect as a consent order or consent decree" thus vesting jurisdiction in the court to enforce it); see also *Joel v. Morrocco*, 688 A.2d 1036, 1040-41 (N.J. 1997) (holding that, where trial court had dismissed underlying action, the appellate court was then without jurisdiction to enforce the settlement because "at the time the settlement was breached, there was no pending case in which to join the individual partners"); *Hanson v. Board of Educ.*, 479 S.E.2d 305, 309-10 (W. Va. 1996) (finding trial court lacked jurisdiction where appellee did not "attempt[] to institute a new proceeding in this matter which would have been an appropriate method to vest jurisdiction in the [trial] court").

<sup>8</sup> Even "language in a dismissal order providing for the reinstatement of an action if a settlement agreement is not consummated does not satisfy the first *Kokkonen* precondition for the enforcement of the settlement agreement itself." See *Shaffer*, 284 F.3d at 504-05. Although the

explicitly - and repeatedly - stated that the Territorial Court would not retain jurisdiction over the enforcement of the settlement, and that if a subsequent breach occurred, the parties' proper recourse would be to file a new complaint for a new cause of action. Moreover, the September 23, 1998 order staying Berne's motion to enforce the settlement agreement merely acknowledges that "a settlement was reached," but does not incorporate the terms of the settlement agreement. "The judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his [or her] order." *Kokkonen*, 511 U.S. at 381.

In short, this suit "involves a claim for breach of contract, part of the consideration for which was dismissal of an earlier . . . suit. The facts to be determined with regard to such alleged breaches of contract are quite separate from the facts to be determined in the principal suit, and automatic jurisdiction over such contracts is in no way essential to the conduct of [court] business." See *Kokkonen*, 511 U.S. at 381. The parties to this action were on notice that any disputes arising out of the settlement would be a separate action.

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district court's order in *Shaffer* left open the option to reinstate the underlying claim within sixty days of the order dismissing the matter, "reinstatement of an action, which revives the underlying claim and sends the litigants back to the original battlefield, is totally different from the enforcement of the terms of a settlement agreement because one of the parties has not complied with those terms." *Id.* at 503.

Accordingly, we find that the trial court, having dismissed the underlying action alleging misconduct, abuse of trust, breach of fiduciary duties and self-dealing by the defendants, without expressly retaining jurisdiction over the settlement of these claims, lacked subject matter jurisdiction to subsequently enforce the settlement agreement. We will therefore vacate the Territorial Court's March 16, 2000 Memorandum Opinion and Order staying the enforcement of the settlement, thus leaving in place the September 23, 1998 Order dismissing this action.

#### **IV. CONCLUSION**

We conclude that the Territorial Court was without jurisdiction to consider Berne's Motion to Enforce the Settlement Agreement because the trial judge neither expressed an intent to retain jurisdiction over the settlement nor incorporated its terms into the dismissing the action. Accordingly, we will vacate the trial judge's order denying Berne's Motion.

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**Julio A. Brady, Esq.**  
St. Croix, U.S.V.I.  
*Attorney for Appellees.*

**ORDER**

Per Curiam.

For the reasons given in the accompanying Memorandum Opinion of even date, it is hereby

**ORDERED** that the Territorial Court's March 16, 2000 Memorandum Opinion and Order staying the appellant's motion to enforce the settlement agreement, is **HEREBY VACATED** because the trial judge was without jurisdiction to consider claims arising from the agreement.

**ENTERED this 19th day of September, 2002.**

**ATTEST:**  
**WILFREDO F. MORALES**  
**Clerk of the Court**

**By:** \_\_\_\_\_  
**Deputy Clerk**

**Copies to:**  
Judges of the Appellate Panel  
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Hon. Jeffrey L. Resnick  
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*Berne v. Boschulte, et al.*  
Civ. App. No. 2000-77  
Order  
Page 2

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